United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7086

To be argued by
ROBERT J. GIUFFRA

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ATLANTIC LINES LIMITED,
Plaintiff-Appellant,

against

AMERICAN MOTORISTS INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLEE

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Issues Presented for Review

1. Whether the findings of the District Court were clearly erroneous as a matter of law when it determined that the plaintiff did not sustain its burden of proof that the loss was fortuitous?

2. Did the District Court err in failing to find, as a matter of law, and upon the testimony presented that the alleged loss was not fortuitous?

Statement of the Case

The plaintiff Atlantic Lines Limited (hereinafter referred to as Atlantic) brought suit against the defendant American Motorists Insurance Company (hereinafter referred to as American Motorists) to recover damages allegedly sustained under an all risks policy issued by American Motorists to cover loss of and damage to equipment owned and/or leased by the plaintiff.

The summons and complaint was filed on June 12, 1974, and American Motorists was served on June 27, 1974. An answer was filed on July 29, 1974. The litigation was submitted to Judge Morris E. Lasker of the Southern District, non-jury, for determination based on the deposition of Atlantic and relevant records marked during the deposition. On February 3, 1976, Judge Lasker rendered his memorandum decision (178a).* Judge Lasker determined that the plaintiff did not sustain its burden of proof and dismissed the complaint. The decision is reported at 408 F.Supp. 970 (S.D.N.Y. 1976).

Statement of Facts

Much of the factual pattern underlying this case is adequately reflected in the memorandum decision of the trial Court (178a). Nonetheless, for purposes of emphasizing the actual testimony as it is pertinent to the issue presented herein, we take the liberty of reciting certain portions of the facts.

This action was filed by Atlantic to recover from its insurer the value of two leased containers, six leased chassis and the repair costs of one leased chassis. American Motorists had issued a policy of insurance which provided for the payment of damages if a loss was sustained under the policy.

Judge Lasker did not conduct any evidentiary hearing. However, counsel for both parties did execute an agreed Statement of Facts as well as submitting to Judge Lasker the deposition of Ross Camardella, General Manager in Charge, Container Damage Division of Atlantic. Exhibits marked during the course of Mr. Camardella's deposition were submitted to Judge Lasker for his consideration.

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* Numerical references followed by the letter "a" are to pages in the Joint Appendix.

The testimony of Mr. Camardella developed that during the period the equipment was utilized by Atlantic, a visual and mechanical system had been developed to keep track of the equipment within Atlantic's service.

The accuracy of the system required the service of a number of individuals who did not testify nor did they submit any affidavits to Judge Lasker (47a, 82a-83a, 94a).

Basically, the system consisted of posting on a control board the location of 709 pieces of equipment which had been leased by Atlantic (121a). The information posted on the control board required both a visual inspection at Atlantic's main terminal at 23rd Street Terminal, Brooklyn, New York, together with an analysis of the equipment's Interchange Receipt records which were prepared when the equipment was received or dispatched by the terminal in Brooklyn (94a-95a). However, no records were ever maintained monitoring the movements of the equipment at either the main terminal or the terminals in the various ports of call of the two vessels in Atlantic's service (48a, 69a).

In any event, all relevant records which included records as to the movement of the equipment, inspection reports, follow-up records, folders and cards for each piece of equipment were destroyed by Atlantic even though they were in the process of submitting a claim to American Motorists for the alleged loss (37a, 48a-52a, 60a, 123a-126a, 131a).

Appendix (a) of appellant's brief contains the dates of the last equipment Interchange Receipt into the 23rd Street pier. It should be noted that for some of the equipment, the last Interchange Receipt record was for February and March, 1972, and it was not until January 18, 1973 that Atlantic reported to the New York City Police Department that its equipment was missing (99a, 105a). This created a serious question concerning the accuracy

of the system developed by Atlantic to ascertain the whereabouts of the equipment in its system.

On May 14, 1973, Atlantic informed the New York City Police Department that one of the containers previously reported as missing in the letter of January 18, 1973 had been located. At the same time Atlantic advised the Police Department that additional equipment could not be located within its system (57a, 64a). Sometime thereafter, some of the equipment which was reported lost in the memorandum submitted to the New York City Police Department on May 14, 1973, was located by Atlantic either on board vessels and/or in the terminal in Miami (60a, 107a).

In fact rental was paid by Atlantic after the date of the reports to the Police Department (67a, 76a).

Mr. Camardella conceded that there never was any reports or records in the files which would reveal or develop the circumstances of how the equipment was missing or that the equipment was stolen (53a, 64a).

As Judge Lasker determined it was impossible to establish the accurate date when the location of the equipment was last reported or any facts which might afford some clue as to the cause of their disappearance, he dismissed the complaint (183a).

POINT I

Atlantic did sustain its burden of proof that there was a loss or casualty.

In an obvious attempt to avoid the impact of Rule 52(a) of the F.R.C.P., counsel for Atlantic argues that the lower Court promulgated a rule of law inconsistent with prior decisions interpreting an all risks policy. It is submitted that the District Court rather than adopting an erroneous standard merely reinstated the basic

rule of law which required Atlantic to submit some evidence that there was a loss and that it resulted because of a fortuitous event or events.

As this Court has pointed out in *Northern Mutual Life Insurance Co.* v. *Linard,* 498 F.2d 556 (2nd Cir. 1974), a fortuitous event by definition includes "happening by accident or chance; unplanned." Moreover, the right of an assured to recover under the policy requires some evidence that a fortuitous event had occurred bringing about coverage. The initial burden of persuading the trier of facts that the event is fortuitous remains on the assured. This burden Judge Lasker found was not sustained by Atlantic. See also *C. F. Leavell & Co.* v. *Fireman's Fund Insurance Co.,* 372 F 2d 784 (9th Cir. 1967); *Redna Marine Corp.* v. *Poland,* 48 F.R.D. 81 (S.D.N.Y. 1969).

The unavailability and destruction of relevant records as to the history of the movement of the equipment to include its condition does create a strong inference that their production would not be favorable to Atlantic. *Tupman Thurlow & Co. SS "Cap Castillo",* 490 F.2d 302 (2nd Cir. 1974).

Nowhere in the deposition of Mr. Camardella nor in records submitted to the lower Court did Atlantic demonstrate that the alleged losses resulted because of some fortuitous event or casualty. The fact that the equipment could not be located within Atlantic's system at the time the service was discontinued is not in itself, without further proof, evidence that the loss occurred because of some fortuitous event.

If this were not so and the court had found in favor of the plaintiff, it could be argued by American Motorists that the conclusions by the trial Court were based on pure speculation and not by any proof.

It will be conceded that Atlantic was not bound to prove the exact nature of the casualty or accident which occa-

sioned the loss, but the fact remains that Atlantic was required to submit some evidence that the losses, if any, were due to an accident or casualty. This was precisely the holding by Judge Lasker in the District Court when he stated as follows: "a party normally demonstrates that a loss was fortuitous by proving the cause of its absence" (184a).

Contrary to the statement on page 12 of Atlantic's brief, the trial Court did not require Atlantic "to prove the exact nature of the accident or casualty", but rather to introduce some evidence that there was a loss (which) was due to an accident or casualty.

This pre-requisite to any right of recovery prevails because even under an all risks policy the insurer has the right to defend the claim on the basis of fraud or willful misconduct on the part of the assured. Moreover, in the case of damaged equipment, the insurer would have the right to demonstrate that the damages resulted because of ordinary wear and tear and depreciation. *British & Foreign Marine Inc.* v. *Gaunt,* (1921) 2 A.C. 41, 57.

These issues were considered in *C. H. Leavell* v. *Fireman's Fund Insurance Co., supra,* where the court stated as follows at page 787:

> An "all risks" policy creates a special type of coverage extending to risks not usually covered under other insurance, and recovery under an "all risk" policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. (See "Coverage Under 'All Risks' Insurance", Annot., 88 A.L. 2d 1122, 1125 (1963).

A report to the New York Police Department some eight to ten months after the last Interchange, does not supply the evidence showing that there was a loss or casualty.

Atlantic having the burden of proof was required to submit some facts sustaining its contentions concerning a loss or casualty. When the trier of facts concluded that the evidence was equally balanced, the District Court was justified in concluding that Atlantic had failed to meet the burden and dismissed the complaint.

POINT II

In any event the findings of the District Court were not "clearly erroneous" within the meaning of Rule 52(a) F.R.C.P., Title 28 U.S. Code.

Rule 52(a) of the Federal Rules of Civil Procedure provides in substance that the findings of fact of the trial Judge in a non-jury case "shall not be set aside unless" the reviewing court is convinced that the finding is "clearly erroneous". In order to reverse, the reviewing court on all the evidence introduced at the trial must have the definite and firm conviction that a mistake has been committed. The cases under this rule are legion including several in the Supreme Court of the United States.

United States v. *United States Gypsum Co.*, 333 U.S. 869 (1948);
Guzman v. *Pichirilo*, 369 U.S. 698 (1962);
McAllister v. *United States*, 348 U.S. 19 (1954).

The "clearly erroneous" standard for appellate review is a strict one, *Graves* v. *Walton County Bd. of Ed.*, 403 F.2d 181 (5th Cir. 1968), and the fact that the reviewing court disagrees with the conclusion reached by the Trial Judge does not establish the findings to be "clearly erroneous." *B's Co., Inc.* v. *B. P. Barber & Associates, Inc.*, 391 F.2d 130 (4th Cir. 1968). The findings of fact by the Trial Judge, sitting without a jury, should not be set aside unless it is clearly demonstrated that they are without adequate evidentiary support or induced by an erroneous view

of the law. *Arkansas Valley Feed Mills, Inc.* v. *Fox De Luxe Foods, Inc.*, 273 F.2d 804 (8th Cir. 1960). In fact, the courts use such terms as "grossly inadequate" as a prerequisite to setting aside the findings of fact of the Trial Judge. *Hoff* v. *U.S.*, 268 F.2d 646 (10th Cir. 1959).

It is to be observed that the Appellate Court is not a trier of facts and is without right to refuse to accept a finding of the trial court on an issue of fact unless "clearly erroneous". *Leach* v. *Maryland Casualty Co.*, 183 F.2d 43 (7th Cir. 1950). Upon review, the Court of Appeals can look only to the evidence most favorable to the District Court's finding and such reasonable inferences as may be drawn from such evidence. *Lewis Mach. Co.* v. *Aztec Lines*, 172 F.2d 746 (7th Cir. 1949); *U.S.* v. *State of Florida*, 482 F.2d 205 (5th Cir. 1973).

It is to be remembered that the Court of Appeals' function is not to review the evidence de novo. *Sessions, Inc.* v. *Morton*, 491 F.2d 854 (9th Cir. 1974); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

If the trial court permissibly have found as it did, not whether the reviewing court would have found otherwise, is the standard for review. *Brown* v. *Aggie & Millie, Inc.*, 485 F.2d 1293 (5th Cir. 1973); *Movible Offshore, Inc.* v. *M/V Wilken I. Falgout*, 471 F.2d 268 (5th Cir. 1973).

Judge Harold Medina in the case of *M. W. Zack Metal Company* v. *S/S Birmingham City*, 311 F.2d 334 (2d Cir. 1962) examined in a well reasoned opinion the philosophy behind Rule 52(a). In that opinion Judge Medina wrote (337-338):

> "A fair statement of the rule is that we may not set aside a finding of fact unless we are left with the 'definite and firm conviction that a mistake has been committed,' * * * and that we will reverse 'most reluctantly and only when well persuaded.' * * * We must respect the evaluation of credibility made by the trial

judge of the witness present before him. * * * When we have thus given due weight to what may be deemed the effect of the demeanor of a witness upon the trial judge we are probably not at much of a disadvantage vis-a-vis the trial judge insofar as concerns documentary proof and testimony read from depositions. * * * What this comes down to in substance is that we must take a good, hard look at the record as a whole, and when all is said and done, given the unavoidable division of function between a trial and an appellate court, we should only reverse when fairly well persuaded. * * *"

It is clear beyond peradventure of doubt that a most exacting reading and consideration of the record of the trial in this case will not create a "definite and firm conviction that a mistake has been committed". Rather it will create a definite and firm conviction that no mistake was made and that all findings of the trial Judge were based on ample and sufficient evidence.

CONCLUSION

The decision and order of the Trial Court dismissing the complaint should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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Atlantic Lines Limited,

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On Appeal From an Order of The United States District Court for The Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Tynch, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 2189 Pitkin Ave., Brooklyn, New York
That on July 19, 1976, he served three copies of the Brief

Hill, Betts & Nash
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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Charles Tynch

Sworn to before me this
19th day of July, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977